No. 17-1104

In the

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., ET AL.,

PETITIONERS,

v.

ROBERTA G. DEVRIES, ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's membership includes many companies that are government contractors or are involved in the maritime trades and thus may be subject to burdensome litigation and potential liability under the Third Circuit's decision in this case. These members, as well as other American businesses, are concerned by the Third Circuit's ruling that a manufacturer may be liable for injuries caused by asbestos, decades or more after the fact, even if it did not make or distribute any asbestos-containing product. The Third Circuit's approach is impractical and unpredictable and will reduce the

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[1] The parties received timely notice of *amicus*'s intent to file this brief and have consented to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

supply of willing federal contractors and cause contractors to charge higher prices.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that in maritime law simple, workable rules are preferable to complex, multi-factor tests. Here, the facts are undisputed: petitioners did not manufacture, sell, or supply the asbestos parts that allegedly injured respondents. Pet. App. 61a–62a, 69a–87a. But the Third Circuit held—in explicit disagreement with the Sixth Circuit—that petitioners may be liable in negligence anyway, based on application of a multi-factor standard cobbled together from various cases that seeks to determine whether petitioners could have foreseen that asbestos would be added to their "bare metal" products in a way that would cause injury to respondents. Pet. App. 10a–16a. Certiorari is needed because the decision below, and the split it creates, undermine the fundamental maritime principles of uniformity, simplicity, and practicality.

The Court's review is especially needed given the importance of practical rules that yield predictable results in the context of federal contracting and procurement. The federal government, and all citizens, have a strong interest in the availability of willing suppliers and predictable pricing. The decision below threatens that interest by exposing government contractors to unexpected litigation and liability.

The decision below is wrong. The Third Circuit essentially held that because negligence claims

implicate questions of foreseeability and foreseeability is generally a question of fact, respondents' claims are proper. That oversimplified analysis misses the point: a maritime court is charged with deciding whether a given type of claim is reasonable in light of principles of maritime law and therefore should be recognized. Basic common-law principles preserve a critical role for the court in determining whether liability is precluded as a matter of law even if issues of foreseeability comprise part of that analysis. Courts cannot just throw up their hands whenever an issue of foreseeability is raised and declare that the claim must perforce go to the jury. This principle has been followed by this Court and other maritime courts in a series of cases, more than a century old, that the Third Circuit ignored. The incongruity in recognizing novel liability that petitioners could not have foreseen, all in the name of foreseeability, underscores the urgent need for certiorari.

ARGUMENT

I. The Court Should Grant Certiorari To Resolve This Circuit Split On An Important Issue of Maritime Law.

Maritime law favors simple, easily applied rules that yield predictable results. This bias goes to a fundamental goal of maritime law—to ensure the free flow of maritime commerce, so vital to economic growth. In contravention of that fundamental principle, the court below crafted a novel and complex multi-factor standard to determine whether a manufacturer of "bare metal" products can be liable in negligence for injuries caused by asbestos that the

manufacturer neither manufactured nor distributed and that was added to the manufacturer's product by others not under the manufacturer's control. The Third Circuit's test is not only indeterminate and impractical but also admittedly incomplete, leaving commercial actors in the dark about their potential liability.

Government contractors need to be able to predict their potential liability when responding to government solicitations for bare-metal products. The decision below consigns contractors to having to foresee limitless liability, on the anomalous rationale that liability turns on foreseeability and foreseeability is a fact question. Courts, on this rationale, have no role in drawing reasonable lines to make maritime law uniform, predictable, and practical. That *faux* judicial modesty flies in the face of a century of maritime cases where courts have determined on undisputed facts that liability was precluded, holding (for example) that there was no duty owed to the plaintiff; that the injury was not a foreseeable harm within the risk of the defendant's alleged negligence; or that the plaintiff was not a foreseeable plaintiff. Like any common-law court, maritime courts have an obligation to determine whether the undisputed facts justify committing the defendant to the burdens of litigation and liability or, rather, whether doing so is unjust and unreasonable. The decision below abdicates that responsibility.

A. Uniformity and Predictability Are Key To Maritime Law.

The Constitution extends the federal judicial power to "all cases of admiralty and maritime

Jurisdiction," U.S. Const., Art. III, § 2, cl. 1, for good reason—to ensure uniform, easily applied rules of conduct and liability on navigable waters. This Court has long "recognized that vindication of maritime policies demand[s] uniform adherence to a federal rule of decision." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996). These rules are "developed by the judiciary" out of an "amalgam of traditional common-law rules, modifications of those rules, and newly created rules," *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–85 (1986), with an eye towards "simplicity and practicality," *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959). By ensuring "a system of law coextensive with, and operating uniformly in, the whole country," maritime law provides uniform rules of conduct that permit commercial actors to accurately predict costs, risks, and potential liability, preventing sudden shocks that interrupt the free flow of goods. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)); *see also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676 (1982) (uniform rules of decision serve "the goal of promoting the smooth flow of maritime commerce"). Indeed, the need for uniformity in this field of law is so great that this Court has recognized that even Congress is powerless to adopt rules of law that would lead to state-by-state variations in admiralty law. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

As demonstrated in the petition, *see* Pet. 15–20, the Third Circuit's approach undermines this uniformity principle and thus the goals of maritime

law. An acknowledged and square circuit split on an important issue of federal law warrants this Court's intervention even without more. But here there is more, because uniformity and predictability are core values of maritime law. Maritime law has a bias for "simplicity and practicality," *Kermarec*, 358 U.S. at 631, so that it will yield predictable outcomes that serve the fundamental goal of ensuring "the smooth flow of maritime commerce." *Foremost Ins. Co.*, 457 U.S. at 676. This Court has expressly rejected the imposition of "inappropriate common-law concepts" on maritime law and efforts to "delineate fine gradations in the standards of care" that apply to similarly situated defendants. *Kermarec*, 358 U.S. at 630; *see also Foremost Ins. Co.*, 457 U.S. at 675–76 (rejecting the "uncertainty inherent" in rules that turn on "fortuitous circumstances"). The split between the Third and Sixth Circuits (and several district courts and state courts) on whether manufacturers of bare metal products can be liable for asbestos injuries will create uncertainty and lead to forum shopping antithetical to maritime law.

The Third Circuit's multi-factor standard is the opposite of "simplicity and practicality." The court attempted to blunt this criticism by arguing that "simplicity is related to familiarity, and foreseeability is such a familiar and key part of tort law." Pet. App. 13a–14a. As a result, the court said, the maritime principle of simplicity and practicality "cuts in both directions and does not provide much guidance" in this case. Pet. App. 13a. That makes no sense. Foreseeability may be a familiar concept, but that does not mean that the adoption of a novel, multi-factor approach that expands liability in the name of

foreseeability was itself foreseeable, let alone that that approach is simple or practical. This Court has rejected multi-factor tests in admiralty cases for the common-sense reason that they are "hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). This perfectly describes the Third Circuit's multi-factor standard. Indeed, the Third Circuit *invited* other courts to add to the complexity, stating that the factors it identified as important "may or may not be" the only factors that matter and that "[t]he finer contours" of when a company may be liable for injuries caused by another company's product, as "applied to various sets of facts, must be decided on a case-by-case basis." Pet. App. 16a.

The Court has reviewed and rejected maritime decisions that are "too indeterminate to enable manufacturers easily to structure their business behavior." *E. River S.S. Corp.*, 476 U.S. at 870. The Court should grant the petition and untangle this skein.

B. The Decision Below Harms Substantial Federal Interests In Procurement and Contracting.

The Third Circuit's decision is especially problematic in the government contracting and federal procurement context. The strong federal interest in these areas provides further support for certiorari. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (noting the "uniquely federal

interest" in "procurement of equipment by the United States").

The bare-metal rule—or what had been a rule, before the decision below turned it into a multi-factor mush—arises frequently in cases like this one, where the Navy has issued detailed specifications requiring delivery of bare metal products that will be fitted with asbestos-containing parts after delivery. This is so even in cases that are technically between private parties, which often arise based on exposures that allegedly occurred during Navy service or work on Navy ships. *See, e.g.*, *In re Asbestos Litig. (Palmer)*, No. CV 14-1064-SLR-SRF, 2017 WL 1199732, at *1 (D. Del. Mar. 30, 2017), *report and recommendation adopted sub nom. Palmer v. Buffalo Pumps Div.*, No. CV 14-1064-SLR/SRF, 2017 WL 1427247 (D. Del. Apr. 19, 2017); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 762 (N.D. Ill. 2014); *O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127, 131 (Wash. 2008). These cases thus implicate "the Federal Government's interest in the procurement of equipment . . . even though the dispute is one between private parties." *Boyle*, 487 U.S. at 506.

The federal interest is heightened where, as here, the procurement is for the national defense. In that context, the government (acting through specifications to its contractors) is often "required by the exigencies of our defense effort to push technology towards its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods." *Harduvel v. Gen. Dynamics Corp.*,

878 F.2d 1311, 1316 (11th Cir. 1989) (quoting *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986); *McKay v. Rockwell Int'l. Corp.*, 704 F.2d 444, 449–50 (9th Cir. 1983)).

The ability of government contractors to accurately price the risk of future litigation and liability is critical to serving two primary goals of federal procurement: protecting the public fisc by getting the best possible price and ensuring an adequate supply of contractors able and willing to meet the government's procurement needs. The Third Circuit's approach works directly against these critical federal interests, because the imposition of novel liability—especially in the unpredictable manner likely to occur under a standard whose "finer contours" are still to be charted—"will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Boyle*, 487 U.S. at 507.

A simple, predictable rule that a company that manufactured or sold a bare metal product is not liable for injuries caused by asbestos that it did not manufacture or sell thus works to ensure lower prices and adequate supply. Here, then, the interest of the government in attracting competitive bids and obtaining needed equipment dovetails with maritime law's bias for simple, practical rules that yield predictable outcomes.

The need for a uniform rule is especially critical in light of courts' unfortunate tendency to water down the government contractor defense recognized

in *Boyle*. Courts have made it a simple matter for plaintiffs to get past summary judgment by crediting pro forma affidavits alleging that specifications for bare metal equipment and parts were not direct or express enough to warrant applying the government contractor defense. *See, e.g., Various Plaintiffs v. Various Defendants*, 856 F. Supp. 2d 703, 710 (E.D. Pa. 2012) ("Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense."); *Willis v. BW IP Int'l Inc.*, 811 F. Supp. 2d 1146, 1156 (E.D. Pa. 2011). This constriction of the government contractor defense heightens the practical need for a uniform bare-metal rule.

C. The Third Circuit Erred in Concluding That The Bare-Metal Issue Must Be Decided By The Factfinder.

The Third Circuit abdicated the responsibility of a maritime court to set reasonable limits on the scope of potential liability. The court's reasoning was: (1) foreseeability is an aspect of negligence liability; (2) respondents' argument against the bare-metal rule raised issues of foreseeability; and (3) foreseeability is generally a fact issue, so (4) the bare-metal issue therefore must go to the jury. This reasoning improperly collapses the traditional four-element test for tort liability into a foreseeability analysis. It also ignores the court's duty to decide whether a given type of liability—especially one as novel as here—is reasonable in light of the goals of maritime law and should be recognized. That a claim implicates issues of foreseeability is not the end of the analysis. To the

contrary, this Court and other courts have repeatedly recognized that maritime courts are responsible for setting limits on the scope of tort liability as a matter of law.

1. Federal Courts Have a Duty To Consider Whether Liability is Reasonable Under Undisputed Facts.

When sitting in admiralty, federal courts are common law courts, applying the traditional elements of duty, breach, causation, and damages to maritime torts. 1 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 5–2 (5th ed. 2017) (elements of a negligence action under maritime law are "essentially the same as land-based negligence under the common law"); *E. River S.S. Corp.*, 476 U.S. at 864 (maritime rules are derived from common law sources). It is a commonplace that foreseeability is a concept embedded in both the duty and causation elements of this traditional structure, as the Third Circuit recognized. Pet. App. 7a. *See also, e.g.*, *Herrera v. Quality Pontiac*, 73 P.3d 181, 189 (N.M. 2003) (foreseeability an element of both duty and causation, though reserved for the judge and jury, respectively); *Barreiro Lopez v. Universal Ins. Co.*, 98 F. Supp. 3d 349, 357 (D.P.R. 2015) (same); 3 Am. Law of Torts § 11:3 (2018) (foreseeability is "sometimes framed in the concept of 'duty,' in other instances as one of 'proximate cause.'").

From this unremarkable observation, the Third Circuit went awry by collapsing the traditional tort elements of duty and causation into an analysis of "foreseeability" alone—and then compounded that

error by presuming that any question that implicates issues of foreseeability must be submitted to the jury and cannot be determined by the court as a matter of law. Pet. App. 7a–9a, 10a–12a. The court openly acknowledged that its self-conscious choice of a "standard-based approach is bound to be less predictable and less efficient, because the standard's fact-centered nature will push more cases into discovery" and, as here, past summary judgment and to trial. Pet. App. 12a.

The Third Circuit was mistaken that a foreseeability test applies at all when a plaintiff asserts a negligence claim against one defendant for *an injury caused by a third party's product*. But even if foreseeability had some role to play in such a claim, the Third Circuit was mistaken in its view that a claim that in some way implicates foreseeability must, for that reason alone, go to the jury. Even in cases where foreseeability is relevant, it is a necessary, but not sufficient, requirement for tort liability. In every negligence case, a fundamental question is whether the defendant owed some duty to the plaintiff. The question of duty may implicate foreseeability, but it is not limited to foreseeability alone. The decision below is an invitation to send *every* negligence claim to the jury. That is clearly not the law; courts have long recognized that although the question of duty requires consideration of whether an injury to a particular plaintiff was foreseeable, that does not mean the court cannot determine the scope of duty as a matter of law. *See* 57A Am. Jur. 2d *Negligence* § 78 (2014) ("The court determines, as a matter of law, the existence and scope or range of the duty, that is whether the

plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection."); Dan B. Dobbs, *The Law of Torts* § 149, at 355 (2000); Restatement (Second) of Torts § 328B (1965). Petitioners thus identified categories of cases where claims for injuries caused by products fail as a matter of law, regardless of whether it may be foreseeable that the defendant's product will be used in combination with some other, injury-causing, product. Pet. 21–24.

But a maritime court's responsibility to police the scope of tort liability is broader than fitting an inquiry into a doctrinal box labeled "duty" or "causation" and proceeding accordingly. Instead, based on a matrix of precedent, policy questions, and prudential considerations, common-law courts are tasked with determining whether to recognize a given species of liability, even when the claim implicates questions of foreseeability. Judge Cardozo and the New York Court of Appeals, as the most famous example, were not dissuaded from determining as a matter of law that Mrs. Palsgraf could not recover even though her claim put at issue whether her injury was a foreseeable consequence of the railroad's negligent act. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

Likewise, the Supreme Judicial Court of Massachusetts had no difficulty in determining, as a matter of law, that there was no negligence in failing to warn of the existence of a "coal hole" into which the plaintiff fell, when coal was piled next to the hole and workers were preparing to dump coal into it, since "[a] heap of coal on a sidewalk in Boston is an

indication, according to common experience, that there very possibly may be a coal hole to receive it." *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898). This was so regardless of whether it was foreseeable that certain plaintiffs would be "blind men" or "foreigners unused to our ways." *Id.* Among the legion of other cases to the same effect, the Georgia Court of Appeals also decided a question of foreseeability as a matter of law on the basis of "remoteness in time and space" when it determined that a security alarm company was not liable when it dispatched police in response to a false alarm and a 73-year-old woman crossing the street as the police vehicles raced by jumped back onto the sidewalk, injuring her hip. *W. Stone & Metal Corp. v. Jones*, 348 S.E.2d 478, 479 (Ga. App. 1986). And the Washington Supreme Court affirmed dismissal as a matter of law of a plaintiff's claim that a convenience store was negligent in failing to provide security to patrons even though it was foreseeable that criminals would loiter and accost invitees. *Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286, 293 (Wash. 1997), *as amended* (Oct. 1, 1997).

The lesson of these cases is that not every novel claim must, or should, be approved. And just because the plaintiff contends that her injury should have been foreseeable to the defendant, that does not mean that the claim has to go to the jury. Common-law courts have an important role to play in ensuring that the law develops in reasonable ways; their job is not to simply punt novel issues to the jury and hope for the best. Rather, whether a particular harm is within the "range of reasonable apprehension" of the risk "is at times a question for the court." *Palsgraf*,

162 N.E. at 101. As a leading treatise puts the point, the common-law court's job is to decide, given the relationship between the plaintiff and the defendant, whether "the law imposes upon the defendant any obligation of reasonable conduct for the benefit of the plaintiff. *This issue is one of law and is never for the jury.*" *Prosser and Keeton on Torts* § 45 at 320 (5th ed. 1984) (emphasis added). The common-law court thus has a "traditional role" to play "in setting the perimeters of negligence. . . . It remains the court's duty to examine the facts of each particular case for that purpose." *Quinlan v. Cecchini*, 363 N.E.2d 578, 581 (N.Y. 1977). To be sure, federal courts may not have frequent occasion to act like common-law courts, but maritime courts *are* common-law courts and these fundamental principles of the common law hold equally true in the maritime context. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996) (rejecting the assertion that courts should "eschew in the admiralty context the 'confusing maze of common-law proximate cause concepts'" that limit liability).

For these reasons, the court below elided the key question—whether recognizing liability in these circumstances would be just and reasonable in light of the goals of maritime law—when it treated foreseeability as dispositive. According to the court below, "[w]hen parties debate the bare-metal defense, they debate when and whether a manufacturer could reasonably foresee that its actions or omissions would cause the plaintiff's asbestos-related injuries." Pet. App. 7a. But reducing the entire analysis to a factual debate over foreseeability oversimplifies matters. In discharging its duty to draw reasonable

lines in developing the law, a common-law court could well conclude that claims like respondents' should be dismissed *even if* it may "sometimes" (Pet. App. 8a) have been foreseeable to non-asbestos manufacturers like petitioners that their products could be fitted with asbestos-containing parts that could injure users. In declaring that "the bare-metal defense is *nothing more* than the concept of foreseeability" and that this requires sending the claim to the jury, Pet. App. 8a (emphasis added), the court below betrayed its lack of understanding of its responsibility as a maritime court. Whether bare-metal manufacturers can properly be held liable in negligence may implicate issues of foreseeability, but that hardly justifies elevating foreseeability above all other considerations, let alone banishing all other considerations from the analysis.

2. Maritime Courts Have Determined That Negligence Claims Fail As a Matter of Law Even When Foreseeability Is At Issue.

As a historical matter, federal courts have regularly conducted the required legal analysis. That is, whether couched as an inquiry into the scope of a duty, the remoteness of an injury, whether a plaintiff was or was not foreseeable, or in other terms, maritime courts have not hesitated to conclude as a matter of law that a defendant is not liable even for causing an injury even where "the concept of foreseeability" may be implicated.

For example, in *The Eugene F. Moran*, 212 U.S. 466, 476 (1909), Justice Holmes noted that "[w]hen a duty is imposed for the purpose of preventing a

certain consequence, a breach of it that does not lead to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort." There, the Court had to allocate liability among various vessels—some passive barges and floats, others active tugs towing the former—for a collision. One barge was undoubtedly negligent for failing to display a light, but that negligence did not appear to have caused the injury alleged; that is, the Court suggested, the harm was potentially not one within the risk of the barge's negligent behavior. *See also Am. Dredging Co. v. Gulf Oil Corp.*, 175 F. Supp. 882, 884 (E.D. Pa. 1959) ("[T]he scope of liability for negligent injury, both at common law and in admiralty, is normally limited by the principle that the injured person has a cause of action only if his interest, as in fact invaded, lay within the risk of harm which in legal contemplation made the actor's conduct blameworthy."), *aff'd*, 282 F.2d 73 (3d Cir. 1960).

In other cases, maritime courts have determined as a matter of law that a particular plaintiff was not foreseeable, even though the defendant's conduct was a factual cause of the injury. For example, in *Diamond State Tel. Co. v. Atl. Ref. Co.*, the tanker *Yeager* came upon two vessels lying stationary in the Delaware River with a telephone cable pulled up and laid upon their decks for repair. 205 F.2d 402, 404–05 (3d Cir. 1953). The vessels had ample lights on, but not the three red vertical lights required to show "cable raised and on deck." As the *Yeager* approached, the vessels sounded danger but the *Yeager* ignored the signal, veering off only at the last

minute—missing the ships but slicing through the cable. The court concluded that even though the *Yeager* could have veered off earlier and was negligently steered, it was not liable as a matter of law because the cable owner was not a foreseeable plaintiff under the undisputed facts:

> In our view of the case, it is irrelevant that the *Yeager* failed to stop in the face of a danger signal, that she crossed the *Adriatic*'s signal, and that she was also negligently navigated, because she did not collide with the *Adriatic* or *Acco*. . . . Here we have the unforeseeable libellant, a maritime instance of the landlubber's unforeseeable plaintiff. . . . [The *Yeager*] could not possibly have foreseen that poor navigation would have subjected libellant's cable to an unreasonable risk of harm because [it] neither knew nor should have known that the cable was there.

Id. at 406–07.

Finally, maritime courts have in a variety of contexts held that defendants have no duty to avoid injury to plaintiffs, whether because of some intervening negligence or because policy considerations suggested that the goals of maritime law were better served by limiting liability in a particular circumstance. *See, e.g.*, *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 52 (1919) (Holmes, J.) (passive towed barge has no independent duty to avoid collision with another vessel); *Matter of the Complaint of Crounse Corp.*, No. 1:14-CV-154-SA-DAS, 2016 WL 4054929, at *3 (N.D. Miss. July 27,

2016) (same); *The New York Marine No. 2*, 56 F.2d 756, 757–58 (2d Cir. 1932) (barge lying close to tug had no duty to signal to passing vessels independently of tug); *Triangle Cement Corp. v. Towboat Cincinnati*, 280 F. Supp. 73, 75–76 (S.D.N.Y. 1967) (no duty to observe or avoid an unlighted or improperly lighted vessel) (citation omitted), *aff'd*, 393 F.2d 936 (2d Cir. 1968).

In these cases, no less than in the present case, foreseeability was a relevant consideration. But in each, the court nonetheless disposed of the claims as a matter of law, adopting precisely the kind of simple and workable rule, designed to produce uniform and predictable results, that the decision below eschewed. Instead of treating foreseeability as dispositive and letting the jury decide whether to recognize the novel form of liability sought by respondents, the Third Circuit should have considered whether it is reasonable and just for the burdens of litigation and novel liability to run against petitioners in these circumstances, and it should have answered that question in the negative. Nor can calling its approach "the fact-specific standard approach" (Pet. App. 8a) justify this abdication of the court's common-law duty, as it is the court's job to decide *which* facts are relevant and sufficient. The Court should grant the petition and hold, in accord with the Sixth Circuit decision that the decision below rejected, that the undisputed facts here do not give rise to liability under maritime law.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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